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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 493

DONALD WHEELDIN AND ADMIRAL DAWSON,
PETITIONERS

v.

WILLIAM WHEELER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals, dated January 30, 1962 (R. 26–29), is reported at 302 F. 2d 36. Its earlier opinion of June 28, 1960 (R. 22–23) is reported at 280 F. 2d 293. The opinion of the district court, dated August 28, 1958 (R. 16–21), is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1962 (R. 30). The petition for a writ of certiorari was filed on April 30, 1962, and granted on October 8, 1962 (R. 31). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the absence of diversity of citizenship, the federal courts have jurisdiction to entertain a suit for money damages against a staff member of a congressional committee based on alleged violations of the Fourth Amendment in issuing a subpoena to appear and testify.

2. Whether petitioners' complaints state claims for damages against the respondent arising under the Constitution or laws of the United States.

CONSTITUTIONAL PROVISION, STATUTE, AND RESOLUTION INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 1331(a) of Title 28 U.S.C. provides:

> The district court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Rule XI of the House of Representatives, H. Res. No. 5, 85th Cong., 1st Sess., 103 Cong. Rec. 47, provided in pertinent part:

RULE XI

POWERS AND DUTIES OF COMMITTEES

* * * * *

17. Committee on Un-American Activities.

(a) Un-American activities.

(b) The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the

United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.

STATEMENT

On August 7, 1958, petitioners were served with subpoenas directing them to appear as witnesses in hearings to be held in Los Angeles by the Committee on Un-American Activities of the United States House of Representatives (R. 26). Thereupon, on August 25, 1958, they brought these civil actions against respondent, an investigator on the staff of the Committee, and other defendants, seeking injunctive relief, a declaratory judgment as to the validity of the subpoenas, and money damages (R. 1–15). The basis of jurisdiction relied upon was 28 U.S.C. 1331, *i.e.*, that the matter in controversy "arises under the Constitution, laws or treaties of the United States." It was affirmatively alleged that the respondents and plaintiffs were all residents of the same State.

The gravamen of the complaints (R. 1–11), insofar as they concerned defendant Wheeler, was (1) that Wheeler's role in the issuance of the subpoena was unauthorized because the Committee members who are authorized to issue subpoenas had not determined

and directed that the plaintiffs be called; (2) that the purpose of the subpoenas was not to inform Congress but was to serve the personal ambitions of the Committee members and to punish the plaintiffs for their political activities; and (3) that, upon appearing before the Committee, the plaintiffs would be publicly subjected to abuse by the Committee and thereby seriously harmed in reputation and public respect. Since the complaints sought a court order in effect quashing the subpoenas, the harm and damage alleged related almost exclusively to the anticipated results of abuse which the plaintiffs predicted that the Committee would commit when and if they appeared. Petitioner Wheeldin did not allege any harm resulting from the mere issuance of the subpoena. Petitioner Dawson alleged that service of the subpoena at his place of work had caused his discharge.

On August 28, 1958, the district court dismissed the complaints for lack of jurisdiction over the subject matter (R. 16–21). Petitioner Wheeldin did not appear at the Committee hearings which were held on September 2, 1958, and did not respond when called to testify. Petitioner Dawson, although directed to appear at these hearings, was never called to testify. Wheeldin was tried and convicted for contempt and sentenced to a nominal fine and thirty days in jail. His conviction was affirmed by the Ninth Circuit. *Wheeldin* v. *United States*, 283 F. 2d 535 (C.A. 9), certiorari denied, 366 U.S. 977.

On June 28, 1960, the Ninth Circuit affirmed the district court's dismissal of the suits for damages

against the marshal and sheriff who were originally joined as defendants in the complaint. As to respondent Wheeler, however, it held that "in the sense of *Bell* v. *Hood*, 327 U.S. 678, we believe there was jurisdiction to entertain the claim for money damages" and that the district court should determine whether a claim was stated. The court noted that the injunctive actions were by then moot (R. 22–23).

On remand, the district court dismissed the remaining damage actions against Wheeler, without opinion, for failure to state a claim upon which relief can be granted (R. 24). The Ninth Circuit affirmed, stating that "[t]o the extent that [the claim of Wheeler's lack of authority] has force, it should, in our view, have been raised in Wheeldin vs. United States, supra, where the appellants resisted their duty to comply" (R. 28) and that, in any event, Wheeler's actions were sufficiently within the general scope of his authority to be protected by the rule of *Barr* v. *Matteo*, 360 U.S. 564 (R. 28–29).

SUMMARY OF ARGUMENT

I

In *Bell* v. *Hood*, 327 U.S. 678, 681–683, this Court held that if a complaint "is drawn so as to claim a right to recover under the Constitution and laws of the United States" the federal court must entertain the suit unless the federal claim "clearly appears to be immaterial" or "is wholly insubstantial and frivolous." The Court also indicated doubts as to the accuracy of calling the latter types of dismissal jurisdic-

tional. Since petitioners' complaints can fairly be read, as they now contend in this Court, to assert that there has been a violation of their rights under the Fourth Amendment, the district court, strictly speaking, had jurisdiction over the case under 28 U.S.C. 1331(a).

II

Although both petitioners now rely solely upon having stated a cause of action under the Fourth Amendment to the Constitution, the complaints state no cause of action under that Amendment. Dismissal of petitioners' suits was accordingly required.

A. The Fourth Amendment grants no protection against being required to appear and furnish testimony to a legislative, judicial, or administrative body. The history and language of the Amendment plainly show that it was intended to protect privacy in residence and possessions and to grant freedom from peremptory arrests. Moreover, this Court has carefully considered both the range of the Fourth Amendment and the scope of testimonial privileges, and has never suggested that the Fourth Amendment is applicable to a summons to appear and give testimony.

B. Even if compelling testimony by Committee order could be considered a search and requiring attendance pursuant to subpoena an arrest, the complaints would not state a cause of action because it does not appear that either petitioner appeared or gave testimony pursuant to the subpoenas. Petitioner Wheeldin, who was convicted and sentenced for contempt for failure to appear, was thereafter restrained

by the trial court, not by the respondent Wheeler. Moreover, this conviction was based upon a judicial determination, sustained on appeal, that Wheeldin was properly ordered to appear.

C. Even if violated, the Fourth Amendment grants no federal right to a damage remedy. Originally viewed as a way of eliminating the immunity of officials from common-law liability for trespass or false imprisonment, the Amendment opens the door to those common-law actions which accord protection to one's residence, possessions, and person against unauthorized invasions of privacy and restrictions upon freedom of movement. Congress, which has legislated extensively in the area, has never granted a federal cause of action for violation of the Amendment.

D. There is an additional reason why petitioner Wheeldin's complaint does not state a cause of action. His conviction of contempt for failure to respond to a valid subpoena can properly be regarded as having finally determined the validity of and authorization for the subpoena. There is no reason why Wheeldin should be allowed to relitigate this issue in civil suits against those involved in issuing the subpoena or prosecuting his failure to appear. If the subpoena calling Wheeldin to appear and testify was valid and authorized, respondent Wheeler cannot be liable for his role in issuing the subpoena, regardless of allegations of personal malice; for his conduct was then privileged under *Barr* v. *Matteo*, 360 U.S. 564.

ARGUMENT

I

PETITIONERS' ALLEGATIONS THAT THE RESPONDENT VIOLATED THEIR CONSTITUTIONAL RIGHTS UNDER THE FOURTH AMENDMENT SATISFY THE REQUIREMENTS FOR FEDERAL-QUESTION JURISDICTION UNDER *BELL* v. *HOOD*, 327 U.S. 678

The Court's order of October 8, 1962, granting the petition for certiorari in this case, directs the parties to discuss the question of federal jurisdiction (R. 31). As we have noted above (p. 5), the district court originally determined that petitioners' complaint did not satisfy the requirements of federal jurisdiction, but this ruling was reversed (as to respondent Wheeler) by the court of appeals on the authority of *Bell* v. *Hood*, 327 U.S. 678. Since petitioners' complaints can be viewed as claiming a right of recovery against respondent which is based on the Constitution and within the scope of the rule in *Bell* v. *Hood*, we do not urge that jurisdiction is lacking here. We do urge (Point II, *infra*), that petitioners' constitutional claims are insubstantial and that they have failed to state a cause of action upon which relief can be granted. However, as the Court has questioned the accuracy of calling this objection a jurisdictional one,[1] we do not press it as such.

In *Bell* v. *Hood*, *supra*, suit had been brought in a federal district court to recover damages from

[1] *Bell* v. *Hood*, 327 U.S. 678, 683; *Baker* v. *Carr*, 369 U.S. 186, 199.

agents of the Federal Bureau of Investigation. The complaint alleged that the damages were suffered as a result of the defendants' acts of imprisoning the plaintiffs, in violation of their rights under the Fifth Amendment to the Constitution, and subjecting them to a search and seizure in violation of their rights under the Fourth Amendment. The district court dismissed the suit for want of federal jurisdiction on the ground that the action was not one arising "under the Constitution or laws of the United States * * *" as required by 28 U.S.C. (1940 ed.) 41(1),[2] and the court of appeals affirmed. 150 F. 2d 96 (C.A. 9).

This Court reversed, holding that, whether or not a valid cause of action is stated, "where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court * * * must entertain the suit."[3] 327 U.S. at 681–682. The Court pointed out that, "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." 327 U.S. at 685. See, also, *Baker* v. *Carr*, 369 U.S. 186, 199–200.

Petitioners' complaint, insofar as here material, invoked the jurisdiction of the district court under

[2] The provision is now at 28 U.S.C. 1331(a), *supra*, p. 2.

[3] The Court indicated that exceptions to this rule might be made where the alleged constitutional claims were clearly immaterial or wholly insubstantial (327 U.S. at 681–682). However, as noted, fn. 1, *supra*, it has also suggested that dismissals on these grounds are not properly to be considered jurisdictional.

28 U.S.C. 1331, which provides that the district courts "shall have original jurisdiction of all civil actions wherein the matter in controversy * * * arises under the Constitution, laws, or treaties of the United States." (R. 1).[4] As petitioners' claim against respondent clearly cannot be one arising under the "laws" of the United States,[5] it is cognizable only if it asserts a right under the Constitution.

The specific constitutional allegations of the complaint do not relate directly to respondent Wheeler's conduct but merely assert that the statute and House resolution empowering the Committee on Un-American Activities to function and to subpoena witnesses are unconstitutional (R. 3, 9). However, the petitioners contended in the court below and now assert in this Court that Wheeler's actions in and of themselves have violated their Fourth Amendment rights

[4] Diversity of citizenship is not asserted.

[5] Petitioners urge in their brief that, since their assertion that the respondent acted in a manner not authorized by the Committee's enabling resolution brings into issue the proper construction of the House resolution, their claim is one arising under the laws of the United States for purposes of federal jurisdiction (Brief of Petitioners, pp. 10–11). But it is well settled that a claim does not satisfy the requirements of federal jurisdiction merely because the course of its decision will raise a question under the Constitution or a federal statute. To establish jurisdiction, the claim must be one which bases its right to recovery squarely on the Constitution or an Act of Congress. *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149, 152; *Gully* v. *First Nat. Bank*, 299 U.S. 109, 115–116; cf. *Bell* v. *Hood*, 327 U.S. 678, 681. And petitioners, of course, do not claim that the House resolution in question can be the direct source of a right to money damages against respondent.

to be secure in their persons and possessions against unreasonable searches and seizures. Since the complaint as whole can be read as relying upon such a claim under the Fourth Amendment to the Constitution, we do not urge that petitioners' claim should fail as a matter of jurisdiction.

II

THE COMPLAINTS DO NOT STATE CAUSES OF ACTION UNDER FEDERAL LAW

The allegations of each of the petitioners' complaints can be summarized as follows: (1) Respondent Wheeler acted in excess of his authority by issuing a subpoena which could only be properly issued by the chairman of the House Committee on Un-American Activities or by the chairman of any subcommittee thereof or by any member designated by any such chairman. (2) The subpoena was not intended to serve any valid legislative purpose but was intended to further the personal ambitions of the Committee members and to punish the plaintiff because of his former Communist activity. (3) Petitioner would have been treated unfairly and exposed to public contempt if he had responded to the subpoena. (4) Petitioner would have been injured and suffered significant damages if he had responded to the subpoena;*

* In the balance of the brief, we argue that petitioners have no legally cognizable claim. We do not, however, wish to be understood to concede that petitioner Wheeldin has alleged a sufficient showing of injury. The allegation that he would have been injured if he had appeared and testified (which he failed to do) does not serve to show that he suffered an injury from the mere service of the subpoena.

and, in the case of petitioner Dawson, substantial injury resulted from the mere service of the subpoena. We submit that these allegations fail to state a cause of action under federal law.

There is no federal statute or common law imposing liability for injuries resulting from an unauthorized and improperly motivated issuance of a legislative subpoena. Moreover, in their complaints and in the courts below petitioners have made no real attempt to show how their constitutional rights had been violated by Wheeler, although they broadly allege that the statutes and resolutions authorizing the House Committee on Un-American Activities to function and to subpoena witnesses are unconstitutional because they (a) violate First Amendment protections; (b) are too vague to satisfy the Fifth Amendment requirement of due process; and (c) authorize an unreasonable search and seizure in violation of the Fourth Amendment. Finally, while petitioners' brief in this Court makes clear that their sole reliance for a cause of action is on the Fourth Amendment to the Constitution (Petitioners' Brief, pp. 2, 9, 10–12, 26), they offer no explanation of the nature of the claim asserted against the respondent under that Amendment.

In light of the above considerations, we shall urge that there are several independent grounds for concluding that the complaints were properly dismissed for failure to state a claim upon which relief could be granted.

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A. THE FOURTH AMENDMENT GRANTS NO PROTECTION AGAINST BEING REQUIRED TO APPEAR AND FURNISH TESTIMONY TO A LEGISLATIVE, JUDICIAL, OR ADMINISTRATIVE BODY

The history of the Fourth Amendment, its wording, and its interpretation by this Court all establish that the Fourth Amendment grants no protection against a witness being compelled to appear and furnish oral testimony to a legislative, judicial, or administrative body.

As this Court has repeatedly recognized, the Fourth Amendment was born of such notorious abuses as the general arrest and search warrants issued in England and held invalid in *Entick* v. *Carrington*, 19 Howell's State Trials 1030, and the writs of assistance issued by the colonial courts of the Massachusetts Bay colony in the years immediately preceding the American revolution. Both Lord Camden's opinion in the *Entick* case and James Otis' famous argument in opposition to the writs of assistance[7] make entirely clear that the liberties involved were: (1) the rights of privacy in home, business residence, possessions and papers and (2) freedom from peremptory arrest and detention without probable cause. These same two rights or liberties, which involve markedly different and far more important interests than those which would be affected by an unauthorized order to appear and testify as to unprivileged matters, formed the basis of the constitutional provisions of the seven States which had constitutional protections similar to

[7] See Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (1937), pp. 58 *et seq.*

the Fourth Amendment prior to the latter's enactment.[8] Again, only a concern for privacy in one's residence and possessions and for freedom from unreasonable arrests and confinement were cited in the crucial statements of Patrick Henry[9] and James Madison[10] demanding and explaining the federal constitutional protections which became the Fourth Amendment.

The wording of the Fourth Amendment confirms what its history establishes—that it was never intended to protect witnesses from being compelled to testify. Testimonial compulsion does not involve "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures * * *." It is no less clear that the protection against seizures of persons, *i.e.*, arrests, refers to governmental officers taking a person into such immediate and actual custody as that generally involved in arrest for a crime and not to requirements to appear at a particular future date to give testimony before a court, administrative tribunal, or Congress. The amendment was written against the background of common law rights against false arrest or imprisonment and these rights only protect against immediate detention under force, threat of force, or assertion of a legal right to detain the person at once, not at some future date. "There is no arrest where the officer does not purport to take the plaintiff presently into

[8] Lasson, *supra*, at pp. 79–82.

[9] 3 Elliot, *Debates*, pp. 58, 445–449, 588.

[10] 1 Annals of Congress, 1st Cong., 1st Sess., pp. 434–435, 438.

custody, but merely directs him to appear in court." Prosser, *Law of Torts* (1955), § 12, p. 50, n. 30.[11]

Finally, while this Court early recognized that a subpoena *duces tecum* requiring the production of documents could accomplish "the substantial objects of [the] acts" of "forcible entry into a man's house and searching amongst his papers" (*Boyd* v. *United States*, 116 U.S. 616, 622), it has never held an order to appear and give unprivileged testimony subject to the requirements of the Fourth Amendment, for such an order, unlike a subpoena *duces tecum*, does not involve an invasion of the privacy of one's papers and effects and thus cannot accomplish the substantial objects of an unreasonable search or arrest forbidden by that amendment. This long-established construction of the Fourth Amendment is particularly meaningful in light of the Court's careful consideration for many years of the constitutional structure of protections against testimonial compulsion—the immunity of a witness from compulsion to furnish testimony which Congress has not sought for any valid purpose,[12] the Fifth Amendment protection against self-incrimination,[13] and, more recently, the First Amendment privilege respecting speech and association.[14]

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[11] *Cf.*, *People ex rel. Hastings* v. *Hofstadter*, 258 N.Y. 425; *Rhodes* v. *Walsh*, 55 Minn. 542; *United States* v. *Scott*, 149 F. Supp. 837 (D. D.C.).

[12] *Kilbourn* v. *Thompson*, 103 U.S. 168; *In re Chapman*, 166 U.S. 661.

[13] See *Boyd* v. *United States*, 116 U.S. 616.

[14] See *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449.

B. NO CLAIM IS STATED UNDER THE FOURTH AMENDMENT BECAUSE IT IS NOT CLAIMED THAT EITHER PETITIONER TESTIFIED OR APPEARED IN RESPONSE TO THE SUBPOENAS

Even if obtaining testimony in response to a Committee order were a search and even if requiring attendance pursuant to a subpoena were an arrest, there could be no violation of the Fourth Amendment stated by the complaints, for it is not claimed that either petitioner appeared or testified.

Petitioner Dawson did not testify and it is not alleged that he even appeared. He was not called as a witness in response to the subpoena in issue and was therefore not tried for contempt. His claim of violation of the Fourth Amendment is, we submit, at its very best equivalent to a contention that an unauthorized and unreasonable order to admit a police official into one's home constitutes in itself a search and seizure even if the order is rejected and no search or seizure takes place.

Petitioner Wheeldin's contention is scarcely more tenable. Like Dawson, Wheeldin neither appeared nor testified in response to the subpoena filled in by the defendant Wheeler. Wheeldin's complaint, which was filed prior to the Committee hearings, does not allege any arrest resulting from his failure to appear.

Moreover, Wheeldin's complaint would not allege an arrest by respondent Wheeler even if the trial court were required to consider the record and results of the petitioner's later conviction of contempt and sentence to thirty days in jail. Petitioner was never arrested or "seized" by respondent. He was

seized by the trial court which found him guilty of contempt for failure to respond to a duly authorized subpoena. Wheeler may have subjected petitioner to the choice of either appearing against his will or defending a prosecution for disregarding a valid subpoena. But petitioner was only seized and his freedom restricted (we repeat, by the trial court) after he was allowed an opportunity to show, and in fact had failed to show, that the subpoena requiring him to appear was not issued pursuant to proper Congressional authority. It is firmly established under the common law of torts that respondent Wheeler could not be held liable for false arrest or imprisonment when the only arrest and imprisonment followed upon a valid conviction of crime.[15] Wheeldin's conviction would also be an absolute bar to a common law action for indirectly causing him harm by a malicious prosecution.[16] It is even clearer that the Fourth Amendment, which was in large part intended to interpose judicial process between official decisions and an arrest, cannot be violated by the mere issuance of a subpoena, the disregard of which leads to a contempt prosecution and ultimate conviction and sentence by the trial court.

The nature of the petitioners' contentions can best be shown by a hypothetical example. If a police officer demands admittance to a private home under a search warrant and is refused, no search has taken

[15] Prosser, *Law of Torts* (1955), § 12; Restatement of the Law of Torts, § 37.

[16] Prosser, *Law of Torts* (1955), § 98; Restatement of the Law of Torts, § 653.

place whether or not the warrant is valid. If the home owner is then prosecuted for failure to give effect to the warrant and is convicted and sentenced to jail, he cannot thereupon sue the police officer for an unconstitutional arrest alleging that the search warrant which gave rise to the prosecution was invalid. The police officer did not arrest the homeowner or send him to jail. He put the homeowner to the burden of defending his refusal to admit the officer, but the homeowner could only be seized after a court had found the warrant legal.

C. THERE IS NO RIGHT TO DAMAGES FOR VIOLATION OF THE FOURTH AMENDMENT

The writers of the Fourth Amendment were well aware of the efficacy of the traditional common law remedies for redressing an illegal search and seizure or arrest if these acts were done without proper authority. The history of John Wilkes' successful attacks on general search and arrest warrants through actions for trespass and false imprisonment brought in the English courts was still fresh at the time the Fourth Amendment was written.[17] Similarly, the landmark case of *Entick* v. *Carrington, supra,* was a suit for trespass for the seizure of papers.

It is fair to conclude, in light of this history, which was familiar to the writers of the Fourth Amendment, that the avenue of civil relief originally contemplated for an illegal search, seizure, or arrest was a suit for trespass, conversion, or false imprison-

[17] See *Wilkes* v. *Wood*, 98 Eng. Rep. 489; *Huckle* v. *Money*, 95 Eng. Rep. 768.

ment. The primary purpose of the Fourth Amendment was to limit the powers of the federal government so that the existence of federal authority for an unreasonable search or arrest could not constitute a defense to a common law suit such as those which had had such remarkable success in England.

The original assumption is no less sound in principle today. The common law and statutory rights to damages, which measure the rights of every person to security from an invasion of his property or an attack on his person by private individuals, also provide the most appropriate standards for fixing civil liability for violations of "[t]he right of the people to be secure in their persons, houses, papers, and effects" by federal officials whose acts are made unauthorized by the Fourth Amendment. There is little reason to grant a damage remedy against unauthorized acts of federal officials in situations where the same acts by private individuals would not occasion liability and there is even less reason to grant a federal remedy in situations where a State remedy for the same act already exists. On the other hand, there are substantial disadvantages to formulating a necessarily elaborate body of federal tort law under the Fourth Amendment which would parallel and duplicate, without preempting, State laws of trespass, conversion, and false imprisonment.

It is particularly significant in this regard to contrast the lack of need for a federal damage remedy under the Fourth Amendment with the policies which have justified this Court in formulating a damage

remedy for the violation of federal statutes which, on their face, impose duties but no liability for damages. See, *e.g.*, *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192, 207. In the latter situation, the Congressional statutes have imposed new duties and protected theretofore unprotected interests in areas where prior statutes and the common law were silent. The fashioning of damage remedies under such statutes merely attached the normal consequence, otherwise lacking, to injuries resulting from the violation of rights accorded legislative protection. In contrast, the Fourth Amendment was neither primarily intended nor necessary to protect otherwise unrecognized rights of privacy and freedom of movement. The common law already protected those rights except where a valid defense of governmental authority was available to the offending person. Limitation of this defense was all that the common law required to protect fully the rights involved, and the Fourth Amendment indisputably accomplished this. There is no need for an additional federal remedy duplicating the liability imposed by state law.

This has been the view of Congress which has, over a period of many years, legislated extensively in providing remedies for violations of Fourth Amendment rights but has never attached a civil liability to invalid searches or arrests by federal officials. Thus, Congress has, for over forty-five years, made it a federal crime to exceed one's authority in executing a search warrant or to exercise that authority with unnecessary severity (18 U.S.C. 2234) or to procure

a search warrant maliciously and without probable cause (18 U.S.C. 2235). For over twenty-five years Congress has made criminal certain searches by federal officials without warrants. 18 U.S.C. 2236.[18] In contrast, Congress' only action with regard to civil liability has been to immunize certain federal officials from common law liability (*e.g.*, for conversion) for seizure of property reasonably believed subject to condemnation or forfeiture. 28 U.S.C. 2465.

Finally, this Court has never held that an unreasonable search, seizure, or arrest gives rise to a separate, federal cause of action for damages. And those lower courts which have considered the question have concluded that the Fourth Amendment does not itself grant a cause of action for damages against federal officials. *Bell* v. *Hood*, 71 F. Supp. 813 (S.D. Cal.); *Johnston* v. *Earle*, 245 F. 2d 793 (C.A. 9); *cf. Koch* v. *Zuieback*, 194 F. Supp. 651 (S.D. Cal.).[19]

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[18] None of these criminal provisions would apply to the unauthorized issuance of a legislative subpoena to testify.

[19] The cases cited by the petitioners at page 25 of their brief are not to the contrary. *Wolf* v. *Colorado*, 338 U.S. 25, does not indicate that a cause of action lies where, as here, the claim is predicated solely on the prohibitions of the United States Constitution. The remedies against offending officers alluded to (338 U.S. at 30, fn. 1) are those provided by State common law or by statutory provision. In *Kilbourn* v. *Thompson*, 103 U.S. 168, and *Anderson* v. *Dunn*, 6 Wheat. 204, the claimed right to damages was apparently based on the laws of the District of Columbia. *Tenney* v. *Brandhove*, 341 U.S. 367, and *Monroe* v. *Pape*, 365 U.S. 167, were suits under the Civil Rights Act, 42 U.S.C. 1983, whereby Congress has provided a right of action against persons who deprive others of their constitutional rights under color of State law. *Hatahley* v. *United States*, 351 U.S. 173, was a suit against the United States under the Federal

At the expense of repetition we must emphasize that we are not suggesting that the Congress intended there to be no liability for unreasonable searches and seizures. Our point is that no separate cause of action was created because appropriate remedies, subject to proper limitations, were provided by the common law.

D. RESPONDENT WHEELER'S ACTIONS IN CAUSING A SUBPOENA TO BE SERVED ON WHEELDIN ARE PRIVILEGED REGARDLESS OF MALICE BECAUSE THE SUBPOENA WAS FOUND TO BE VALID IN WHEELDIN'S TRIAL FOR CONTEMPT

1. The issue of the validity of the subpoena issued to Wheeldin was necessarily determined against him in his contempt trial for failure to respond. This conviction was affirmed by the Ninth Circuit in *Wheeldin* v. *United States,* 283 F. 2d 535, certiorari denied, 366 U.S. 977. Asked to reconsider the matter of Wheeler's authorization in the present case, the Ninth Circuit stated of the petitioner's contention, "To the extent that it has force, it should, in our view, have been raised in *Wheeldin* v. *United States, supra,* where the appellants resisted their duty to comply" (R. 28).[20] We submit that this was a sound

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Tort Claims Act, 28 U.S.C. 1346(b) *et seq.* The source of the law relied upon in *Williams* v. *Kozak*, 280 Fed. 373 (C.A. 4), does not appear from the court's opinion.

[20] In fact, the question of authorization was litigated in the contempt trial and was not made the basis of argument to the trial court or the Ninth Circuit simply because the record indicated that Wheeler had been directed to subpoena Wheeldin by the Chairman of the Committee. In his closing argument to the district court petitioner's counsel, Mr. Okrand, stated:

"We don't have the problem here, really, that we thought we might have, as to whether or not the investigator himself chose

application of the principles of *res judicata* and collateral estoppel.

"There has been a growing recognition that rigid adherence to mutuality tends to defeat what is probably the major policy underlying res judicata—that litigation be brought to an end. Hence, the emphasis—far more perceptible in dicta, however, than in actual holdings—is increasingly being put on the question whether a party has had his day in court on an issue, rather than on whether he has had his day in court on that issue as against a particular litigant." *Developments In The Law—Res Judicata,* 65 Harv. L. Rev. 818, 862. This policy has led a number of courts to hold a criminal conviction conclusive of the facts determined therein in later suits brought by the convicted persons against third parties. *Austin* v. *United States,* 125 F. 2d 816 (C.A. 7); *Connecticut Fire Insurance Company* v. *Ferrara,* 277 F. 2d 388 (C.A. 8); *Eagle, Star and British Dominions Ins. Co.* v. *Heller,* 149 Va. 82; *Mineo* v. *Eureka Security Fire & Marine Ins. Co.,* 182 Pa. Super. 75; *cf. United States* v. *Wainer,* 211 F. 2d 669 (C.A. 7); *United States* v. *Gramling,* 180 F. 2d 498 (C.A. 5).

The same policy governs the application of the doctrine of collateral estoppel to the issue of the validity of the subpoena in the present case. Petitioner Wheeldin, represented by the same counsel, litigated the issues of validity and authorization of the sub-

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the person to be served. Apparently, under the evidence in this case, the Chairman of the Committee told Mr. Wheeler who to serve." (Volume IV, p. 330, of Record in *Wheeldin* v. *United States*, No. 693 Misc., Oct. Term, 1960.)

poena in his contempt trial. His conviction for failing to appear necessarily involved a finding that the subpoena ordering him to appear was valid. The importance of the criminal prosecution was such as to assure his full concern with sustaining any defenses available to him. The burden of proof in the criminal contempt case was imposed upon the government and was greater than that involved here. In these circumstances, no requirement of fairness dictates that Wheeldin be allowed to relitigate the issue of validity of the order that he appear in separate civil suits against every government official connected in any way with the issuance of the subpoena or with his prosecution.

2. If the subpoena issued to Wheeldin was valid, respondent Wheeler's actions in causing the subpoena to be issued to and served upon Wheeldin are plainly privileged under the rule of *Barr* v. *Matteo*, 360 U.S. 564, regardless of allegations of malice or improper motivation. The gravamen of Wheeldin's complaint against Wheeler—apart from the issues of authority to issue the subpoena and the validity of the subpoena—is that Wheeler supplied the Committee with the information which resulted in his being designated as a proposed witness with the malicious intent of injuring the petitioner (R. 4–6, 9–10). As the court below noted (R. 28), "The injurious action of appellee [respondent] thus followed from the conclusion drawn by him from his investigation, and resulted from the manner in which he has done the very thing he was employed to do." As an investigator for the House

Committee, it was respondent's obligation to use his judgment in proposing witnesses to the Committee and in assuring effective service of the Committee subpoena. The policy declared in *Barr* v. *Matteo*—one designed to encourage federal officers to perform their duties vigorously and free from intimidation by the threat of damage suits—fully requires that respondent be held immune from liability based upon his discharge of that obligation.

Barr v. *Matteo* was an action for libel based upon a press release which Barr had issued as Acting Director of the Office of Rent Stabilization. *Howard* v. *Lyons,* 360 U.S. 593, a companion case, involved a suit for defamation predicated on a statement issued by Lyons, who was the Commander of the Boston Naval Shipyard. The Court held that both of the Government employees were absolutely privileged against liability for damages because the actions complained of had been performed within the scope of their official duties. The privilege, the Court added, was applicable despite the allegations of malice directed against the officials. 360 U.S. at 575.

In reviewing the history of the federal law of privilege as a defense by Government officers "to civil damage suits for defamation and kindred torts",[21] the Court pointed out that, while Congress (by Constitutional provision) and judicial officers (by court decision) early had an absolute privilege in the exercise of their official functions, the privilege had also been applied in *Spalding* v. *Vilas,* 161 U.S. 483,

[21] 360 U.S. at 569.

to protect officials in the executive branch. Concluding that the balance between the public and private interests involved should be struck in favor of the former, the Court described the basic justification for the grant of immunity as follows (360 U.S. at 571):

> It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government. * * *

The Court quoted extensively from Judge Learned Hand's opinion in *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (C.A. 2), which, it noted, had admirably expressed the reasons underlying the privilege:

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irre-

> sponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. * * *

Petitioners seek to avoid the impact of the *Barr* decision by placing heavy reliance on the fact that respondent's duties were at an intermediate, rather than a policy-making, echelon. They urge that the immunity recognized in *Barr* "should be accorded only to officials exercising policy making functions." (Brief, p. 22.) But both the language and the rationale of *Barr* v. *Matteo*, and *Howard* v. *Lyons* make it plain that the privilege is not restricted to "policy making" officials, but protects also lesser governmental employees. The Court emphasized (360 U.S. at 572–574) that:

> The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude

> of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.
>
> * * * It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to "matters committed by law to his control or supervision," *Spalding* v. *Vilas, supra,* at 498—which must provide the guide in delineating the scope of the rule * * *.

As the Court recognized, since the privilege is "an expression of a policy designed to aid in the effective functioning of government", the only difference in its application to actions of high ranking executive officers and to those of an officer of lower rank lies in the broader range of the functions and responsibilities and the wider scope for the exercise of discretion in the case of the former.

The lower federal courts—both before and since the *Barr* decision [22]—have consistently deemed the privilege to be applicable to lower ranking federal employees. See *e.g., Newbury* v. *Love,* 242 F. 2d 372 (C.A.D.C.), certiorari denied, 355 U.S. 889 (suit for defamation against a Government personnel officer); *Papagianakis* v. *The Samos,* 186 F. 2d 257 (C.A. 4),

[22] See 3 Davis, *Administrative Law Treatise*, Sec. 26.01 (1960 Supp.) ("[T]he law before the Barr decision was overwhelmingly what the majority held it to be in the Barr case * * *").

certiorari denied, 341 U.S. 921 (suit against immigration officials seeking damages on the ground of false imprisonment); *Sauber* v. *Gliedman,* 283 F. 2d 941 (C.A. 7), certiorari denied, 366 U.S. 906 (action for malicious defamation against a Special Assistant to the Attorney General); *Laughlin* v. *Garnett,* 138 F. 2d 931 (C.A.D.C.), certiorari denied, 322 U.S. 738 (United States Attorneys and a policeman sued for malicious prosecution); *Cooper* v. *O'Connor, et al,* 99 F. 2d 135 (C.A.D.C.), certiorari denied, 305 U.S. 643 (Comptroller of Currency and deputies, receiver of bank, attorney for government, special agent of F.B.I., sued for malicious prosecution); *Bershad* v. *Wood,* 290 F. 2d 714 (C.A. 9) (action for damages against internal revenue officers); *Hughes* v. *Johnson,* 305 F. 2d 67 (C.A. 9) (suit for trespass against federal game wardens).[25]

While we submit that petitioner Dawson's complaint does not state a cause of action for the three reasons first discussed above (pp. 9–23), we do not contend that it, like Wheeldin's complaint, can also be dismissed on the authority of *Barr* v. *Matteo, supra.*

[25] See also *Michaels* v. *Chappell,* 279 F. 2d 600 (C.A. 9), certiorari denied, 366 U.S. 940, involving a claim for abuse of process against federal narcotics investigators; *Lang* v. *Wood,* 92 F. 2d 211 (C.A.D.C.), certiorari denied, 302 U.S. 686; *Poss* v. *Lieberman,* 299 F. 2d 358 (C.A. 2), certiorari denied, 370 U.S. 944; *Brown* v. *Rudolph,* 25 F. 2d 540 (C.A.D.C.), certiorari denied, 277 U.S. 605; *Jones* v. *Kennedy,* 121 F. 2d 40 (C.A.D.C.), certiorari denied, 314 U.S. 665; *Porter* v. *Eyster,* 294 F. 2d 613 (C.A. 4); *Ove Gustavsson Contracting Co.* v. *Floete,* 299 F. 2d 655 (C.A. 2); *Carr* v. *Watkins,* 227 Md. 578.

Dawson, unlike Wheeldin, was not tried or convicted for failure to respond to a valid and authorized subpoena. It is therefore open to him to contest the authorization for Wheeler's acts and the validity of the subpoena with which he was served.

Construing Dawson's complaint to allege only an impermissible delegation of the subpoena power by the Committee to Wheeler, the court below held that the invalidity of any such purported delegation was, in this case, a formality which could not be made the basis of Wheeler's liability for damages without frustrating the purposes of *Barr* v. *Matteo*, 360 U.S. 564. We recognize that Dawson's complaint, which must be construed most favorably to the plaintiff,[24] can be read to allege that no member of the Committee even attempted to delegate the Committee's subpoena power to Wheeler. Thus the material allegation regarding authorization states that Wheeler "secured from the staff of said Committee, blank subpoenas in large numbers, in all respects except the signature thereof completely blank" (R. 9, 4). While this allegation may indicate the concurrence of some members of the Committee *staff* in Wheeler's actions, it need not be read, as the court below apparently assumed, to allege an attempted delegation of the subpoena power to Wheeler by members of the Committee itself or even to assert that the Committee had knowledge of any such use of the subpoena power by Wheeler.

Since it is clear that members of the Committee staff have no authority to delegate the right to issue

[24] See 2 Moore, *Federal Practice*, ¶ 12.08, p. 2245; *Tahis Erk* v. *Glenn L. Martin Co.*, 116 F. 2d 865 (C.A. 4).

subpoenas and that an investigator would be aware of this lack of power, we do *not* contend that, on the allegations of the complaint, respondent Wheeler was acting sufficiently within the scope of his authority to be immune from a suit for damages under the holding of *Barr* v. *Matteo, supra*. It is hardly necessary to add that we do not believe that the complaint, as so construed, accurately states the facts regarding issuance of the subpoena. See note 20, p. 23, *supra*. However, we are constrained to accept this construction in considering the correctness of granting a motion to dismiss on the basis of *Barr* v. *Matteo, supra*. Accordingly, so far as petitioner Dawson is concerned, we rely solely upon the three independent grounds for affirmance elaborated under Points II A, B, and C, *supra*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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